Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated With Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket 98-170

Petition For Limited Reconsideration

The Ad Hoc Telecommunications Users Committee (hereinafter "Ad Hoc" or the "Committee"), pursuant to section 1.429 of the Commission's Rules, hereby petitions for limited reconsideration of the Commission's December 13, 2002 *Report and Order and Second Further Notice of Proposed Rulemaking*, in the above-captioned proceedings.[1] Specifically, Ad Hoc seeks reconsideration of that portion of the *Report and Order,* that seemingly would allow carriers to collect from their customers through separate line item charges, without regard to the levels of such charges, administrative costs that the carriers allegedly incur to collect and remit their contributions to the Universal Service Fund (USF).

In its *Report and Order*, the Commission, among other things, prospectively prohibits carriers from including any "mark-up" over and above the Commission-specified universal service fund ("USF") contribution in any USF-attributed billing surcharge applied on end-user bills.[2] However, at paragraphs 54-55 of the *Report and Order*, the Commission indicates that carriers would be permitted to recover certain "administrative costs" associated with USF-related collection and remittance activities in end-user rates, provided that these are not "characterized as federal universal service contribution recovery charges."

The Commission notes that "[w]e do not anticipate that administrative costs associated with our contribution methodology will be extraordinary."[3] In fact, any such "administrative costs" are likely to be so small as to border on the truly inconsequential.

In this regard, the Commission can look to an entirely analogous situation – state sales tax regimes – to provide guidance both as to the overall *magnitude* of such administrative costs as well as to the extent to which entities that are

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1 *Federal State Joint Board on Universal Service,* Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, released December 13, 2002 (hereinafter the *Report and Order).*

2 *Id.,* at paras. 51-53.

3 *Id.,* at para. 55.

made responsible for the collection and remittance of a government-imposed charge are to be compensated for whatever administrative costs they may actually incur. Sales taxes, which are currently in effect in the majority of states, are collected at the point of sale by the retail merchant and are remitted by the merchant to the state's revenue department. A number of states provide some compensation to the retail merchant for its work in collecting and remitting the sales tax revenue. As demonstrated in the attached tabulation, these administrative fees, where allowed, are in all cases extremely small (of the order of 1% to 2% or less of aggregate sales tax collections) and in a number of instances are capped at specified levels.

Pennsylvania, for example, describes the administrative fee retention as follows:

> If a [sales tax] return is filed by a licensee and the tax shown to be due thereon less any discount is paid all within the time prescribed, the licensee shall be entitled to credit and apply against the tax payable from him a discount of one percent of the amount of the tax collected by him ... *as compensation for the expense of collecting and remitting the same* and as a consideration of the prompt payment thereof. (72 P.S. § 7227, P.L. 6, No.2, art. II, § 227 (March 4, 1971), emphasis added.)

Significantly, the administrative burdens that are imposed upon retail merchants in connection with sales tax collection and remittance are substantially greater than those imposed upon a telecommunications carrier in connection with the Commission's USF requirements. Sales taxes are typically collected on a per-transaction basis at the point of sale often in amounts of as little as a few cents, whereas the USF surcharge is mechanically calculated and automatically applied by the carrier's billing system to the customer's aggregate billing for the month. Sales tax regimes themselves are frequently complicated by differing product classifications, rates, partial or total product-based exemptions (*e.g.*, in Massachusetts the first $175 of the price of each individual article of clothing is exempt from the state's 5% sales tax), customer-based exemptions (*e.g.*, government agencies, not-for-profit corporations), possible non-applicability of the sales tax on sales to certain (but not necessarily to all) out-of-state customers, differing tax rates applicable in different counties or municipalities within a state, and the like. In sharp contrast, the Commission's USF funding regime involves the application of a uniform rate on all interstate and international revenues, except for revenues associated with lifeline subscribers, or some other metric (*e.g.*, connection-based, telephone number-based) that may be adopted by the Commission in the future.

Consider the following example using the Pennsylvania administrative cost allowance. Suppose that a particular retail merchant had $1-million in aggregate sales in a given period, of which $800,000 are subject to the state's 6% sales tax. The merchant would be responsible for collecting and remitting some $48,000 in sales taxes, but would be allowed to retain only $480 (*i.e.*, 1% of the $48,000 of sales tax) as compensation for its administrative burdens. Expressed in terms of total taxable sales, the administrative cost recovery allowed by the Pennsylvania Department of Revenue would be only 0.06% -- *i.e.*, six one-hundredths of one percent. Extrapolating this same 1% administrative fee to a telecommunications customer's bill and using the currently-prescribed 7.28% USF surcharge, the administrative cost charge for a customer with $10 in monthly interstate charges would be $0.00728 (*i.e.*, approximately seven tenths of one cent), and for a VTNS customer with $1-million in monthly interstate charges the administrative fee would be only about $728. Indeed, if the entire $1-million appears on a single bill and is thus subject to a single USF surcharge, it is, to say the least, difficult to imagine how the administrative costs associated with that one line item could possibly be anywhere close to even that $728 amount.

Perhaps an even better analogy to the collection and remittance of USF contributions by telecommunications carriers can be found in those same carriers' responsibilities for the collection and remittance of the 3% Federal Excise Tax ("FET") on telecommunications services. As with the USF charge, the FET is calculated and charged not on a per-transaction basis (as is the case with state sales taxes) but instead with respect to the customer's aggregate monthly bill. To the best of the Committee's knowledge, there is no "administrative fee" that carriers are permitted to retain or otherwise collect with respect to the FET, nor to the best of the Committee's knowledge have carriers ever sought such a fee or the right to recover any FET-related "administrative costs" from their customers. Additionally, IRS regulations require most telecommunications carriers to make semimonthly deposits of excise tax collections on a "considered as collected" basis.[4] For example, amounts billed between March 1 and March 15 would be considered as collected by April 7, and

[4] IRS Publication 510, *Excise Taxes for 2002*, at 29.

would be required to be deposited with the IRS by April 10.[5] Thus, not only do telecommunications carriers receive no compensation for any "administrative costs" associated with FET collections, they also obtain no "float" (*i.e.*, cost-free use of the collected funds). In stark contrast, Universal Service Administrative Company ("USAC") billing practices provide carriers with approximately 30 days of "float" between the average date of USF collection by the carrier and the required date for remittance of those funds to USAC.[6] That "float" is itself a form of compensation for whatever "administrative costs" carriers might incur, and is if anything more than sufficient to provide full and adequate compensation for any such costs.

While Ad Hoc commends the Commission for its correct determination that administrative costs will not be "extraordinary," the Committee is, nevertheless, concerned that the carriers will construe the *Report and Order* as allowing imposition of separate "administrative cost" line items without limit as long as the carrier does not represent such fees as part of the federal universal service contribution recovery charges. As the Commission has remarked, "[c]arriers that are not rate-regulated ... will have the same flexibility that exists today to recover legitimate administrative and other related costs" and that "such costs can always be recovered through these carriers' rates *or through other line items*."[7] True enough, but if the cost recovery is accomplished "through other line

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5 *Id.*

6 It is Ad Hoc's understanding that USAC issues bills on or about the 15th day of each month corresponding with amounts projected to be collected by the carrier during that same month, and that payment to USAC is then due by the 15th of the following month, after which late fees are applied by USAC.

7 *Id.,* para. 55, emphasis added.

items," it would be a gross and unreasonable misrepresentation of the basis for any such line item for a carrier to ascribe or attribute the need for it to administrative requirements driven by the USF contribution mechanism inasmuch as the actual administrative burdens and costs involved in collecting and remitting the USF contributions are so immeasurably small.

Carriers should not be permitted to implement an "administrative" cost line item and ascribe the need for it to some FCC or other "regulatory" requirement, unless the carrier affirmatively demonstrates that the "surcharge" amount bears a reasonable relationship with the added costs it actually incurs as a result of the USF collection and remittance requirements and that are not recovered through the Commission prescribed USF assessment factor. Like any unregulated business, a telecommunications carrier intends for its prices to recover *all* of its costs of doing business and permit it to earn a profit. All businesses incur costs incident to compliance with government programs and other requirements; at the very most, a carrier should be allowed to characterize as a "surcharge" only those *net additional costs*, over and above the level of compliance costs embedded in its base rates that it can legitimately attribute to a new regulatory requirement.[8] Thus, setting an "administrative costs" or "regulatory" surcharge at levels that would recover costs above the actual added costs incurred as a result of the USF collection requirements that are not recovered through the Commission prescribed USF factor would constitute an unreasonable and

8 In the case of the USF collection and remittance requirement, whatever negligible administrative costs the activity may entail must be offset by the additional "float" available to the carrier from the time that it collects the USF funding surcharge until it remits it to the USF funding administrator.

misleading practice, just as the Commission found that prospective marking-up of its prescribed USF assessment factor would be an unreasonable practice. The Commission should partially reconsider the *Report and Order* to make clear that the carriers may not do so.

The Commission cannot rely on the marketplace to police carrier imposition of inflated and misleading “administrative” cost surcharges. The Commission has concluded that its responsibilities preclude reliance on marketplace forces to prevent inflation and mischaracterization of the Commission prescribed USF assessment factor. The same consideration for ratepayers mandates a similar approach with respect to the added “administrative costs” incurred by carriers to collect and remit monies to the USF. Ratepayers, as well as the integrity of the Commission’s USF program, deserve protection from the unreasonable practice of inflating charges, including administrative charges, associated with the USF.

In the interest of avoiding administrative burden, Ad Hoc suggests that the Commission establish a “presumptively” reasonable level at or below which carrier USF administrative cost surcharges would be considered not misleading and not an unreasonable practice.[9] The data set forth in the Attachment hereto support an administrative surcharge no higher than one percent (1%) of the amount of money collected for remittance to the USF. Indeed, inasmuch as the administrative burdens associated with USF collection and remittance are

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[9] The Commission previously has relied on “presumptions” of reasonableness, to avoid administrative burdens and to protect the often conflicting interests of carriers and their customers. *See Policy and Rules Concerning Rates for Dominant Carriers,* 5 FCC Rcd 6786,

substantially less than those associated with a state sales tax regime and are far more comparable to the burdens associated with FET collection and remittance (for which no administrative cost recovery is provided), USF-related administrative cost surcharges above that level would be presumptively establish a misleading and unreasonable carrier practice that could give rise to Commission sanctions, absent carrier justification.

In view of the foregoing, Ad Hoc urges the Commission to reconsider the Report and Order to the extent requested above. Absent such reconsideration, the odds are very high that carriers will set USF-related surcharges at levels that are excessive and misleading.

Respectfully submitted,

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6822 (1990); Erratum, 5 FCC Rcd 7664 (1990), *modified on recons.,* 6 FCC Rcd 665 (1991); *AT&T Price Cap Order*, 4 FCC Rcd 2873, 3079 (1989)

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